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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

No. 916

DAIRY PRODUCTS COMPANY OF UNIONTOWN,
Petitioner,

vs.

CLARK J. SLEETH, HEALTH OFFICER OF MONONGALIA COUNTY, WEST VIRGINIA,
Respondent.

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To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on December 27,

1955, reversing the judgment of the District Court of the United States for the Northern District of West Virginia, entered on January 3, 1955.

OPINIONS BELOW

The opinions of the District Court for the Northern District of West Virginia and of the Court of Appeals for the Fourth Circuit have not been reported. The opinion of the District Court, dated December 13, 1954, appears in Appendix K, page 109, Court of Appeals. The opinion of the Court of Appeals, dated December 27, 1955, is appended hereto as Appendix I, page 29.

JURISDICTION

The judgment of the District Court was made and entered on January 3, 1955, and appears in Appendix L, page 125, Court of Appeals.

Upon motion of the defendant for rehearing, an order was made by the District Court on January 5, 1955 suspending the judgment of the court pending rehearing on the motion. Rehearing was had on April 18, 1955, on which date the court overruled the defendant's motion, reinstated the court's judgment of January 3, 1955, and directed defendant within ten days from the entry of the order to issue a permit to plaintiff to sell milk and milk products in Monongalia County, West Virginia. Motion by defendant for rehearing appears in Appendix M, page 128, Court of Appeals. The order of April 18, 1955, appears in Appendix P, page 263, Court of Appeals.

Upon appeal by defendant the Court of Appeals reversed, December 27, 1955. Petitioner then filed a petition for a re-

hearing in the Court of Appeals on January 25, 1956. Order staying the mandate pending action of the court was entered on January 30, 1956; and by an order on February 7, 1956, the court denied rehearing asked for and directed that mandate issue after the expiration of five days. Copy of the judgment is appended hereto as Appendix II.

The District Court had jurisdiction,

(1) On the ground of diverse citizenship;

(2) A federal question, involved the right of the plaintiff to engage in interstate commerce under the federal constitution.

The jurisdiction of this court is invoked under Title 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petitioner has a milk processing plant in Uniontown, Fayette County, Pennsylvania. It purchases its raw milk from some two hundred fifty to three hundred dairy farms located in Fayette, Somerset and Washington Counties, Pennsylvania, and Garrett County, Maryland. Having a surplus of pasteurized milk to market, it made application to Roger A. Kennedy, then Health Officer of Monongalia County, West Virginia, for a permit to sell pasteurized milk in said county. The permit was refused. Petitioner then brought suit in the United States District Court for the Northern District of West Virginia, asking the aid of the court in getting a permit.

The State of West Virginia had adopted the Milk Ordi-

nance and Code recommended by the United States Public Health Service. The Commonwealth of Pennsylvania has not adopted this code, but has its own basic law and milk regulations promulgated by its Advisory Health Board pertaining to the production, processing and sale of milk. Under Pennsylvania procedure dairy farms are inspected by licensed dairy farm inspectors, qualified to do this work under the law and regulations of the commonwealth. These inspectors are paid by industry—in this instance, Dairy Products Company of Uniontown.

Section 11 of the West Virginia Milk Regulations provides that milk from beyond the limits of routine inspection by the State of West Virginia may not be sold in the state unless produced or pasteurized under provisions equivalent to the requirements of the regulations, provided that the health officer shall satisfy himself that the health officer having jurisdiction over the producing and processing is properly enforcing such regulations.

The Health Officer of Monongalia County took the position that Pennsylvania regulations and procedures were not equivalent to those of West Virginia, and refused to recognize the system of dairy farm inspection followed by Pennsylvania and the City of Pittsburgh, which has been treated as the enforcing agency in this case, for the reason that Dairy Products Company sells milk in Pittsburgh, and has a permit to do so from both Pennsylvania and Pittsburgh.

The effect of the position taken by the Health Officer of Monongalia County is to exclude absolutely the milk of Dairy Products Company from the State of West Virginia, unless and until such time as the Commonwealth of Penn-

sylvania shall change its system of dairy farm inspection, making it identical to the method followed by the Health Officer of Monongalia County in the inspection of dairy farms in said county.

The District Court held that Pennsylvania and Pittsburgh regulations and procedures were equivalent to those of West Virginia, and that Dairy Products Company was entitled to a permit to sell milk in Monongalia County. This finding was based on testimony taken before the court. Upon appeal to the United States Court of Appeals, Fourth Circuit, by defendant, the Court of Appeals reversed, thus sustaining the position of the Health Officer of Monongalia County.

There is no question here of the quality of the milk of Dairy Products Company. The defendant Kennedy testified it was of good quality. App. I, p. 80, Court of Appeals.

Therefore, the principal question presented is, whether the Health Officer of Monongalia County, by refusing a permit to Dairy Products Company, may exclude its milk, which is admittedly of good quality, absolutely from West Virginia, and thereby deprive it of its right to engage in interstate commerce under the federal constitution. The District Court said that he could not. The Court of Appeals reversed.

A subsidiary question is, whether the Court of Appeals should not have adhered to the findings of fact of the District Court. It disregarded the District Court's findings without holding them clearly wrong.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ORDINANCES AND REGULATIONS INVOLVED

(1) Constitution of the United States, Article I, Section 8, Clause 3, Commerce.

(2) Title 28 U.S.C. 1254(1), Jurisdiction.

(3) Federal Rule 52(a), Finding of Facts.

(4) Code of West Virginia, Chapter 16, Article 7, Section 5.

(5) The pertinent portions of West Virginia Milk Regulations of January 3, 1944, adopted under above code provisions, and revision thereof of September 16, 1954.

(6) An act of the General Assembly of the Commonwealth of Pennsylvania designated as No. 210, To Safeguard Human Health and Life, etc., approved by the Governor July 2, 1935, and the Advisory Health Board regulations pertaining to milk and milk products adopted April 2, 1940.

(7) Regulations adopted by City of Pittsburgh Health Department under Ordinance No. 500. App. O, pp. 188, 189, 190, 191, Court of Appeals.

(8) Pertinent parts of Milk Ordinance and Code recommended by United States Public Health Service, 1953 Edition.

The above are appended hereto as Appendix III, pp. 39-72.

STATEMENT

Original complaint filed September 12, 1951, *Dairy Products Company of Uniontown* vs. *Roger A. Kennedy, Health Officer of Monongalia County, West Virginia.* Defendant answered and moved to dismiss; motion overruled March 26, 1952 by Judge Wilson Warlick, judge by designation. Case set for hearing September 30, 1952 before Judge Robert N. Wilkin, judge by designation. By agreement of the parties and by order of the court, Darold W. Taylor of the United States Public Health Service was designated to make an inspection of the dairy farms tributary to the processing and receiving plants of the plaintiff, as may be required under West Virginia Milk Regulations adopted January 3, 1944, as a prerequisite for permit to plaintiff by defendant to sell milk in Monongalia County. Taylor made the inspection and filed his report in the Clerk's office January, 1953, to which report plaintiff filed objections.

At a further hearing held before Judge Wilkin November 6, 1953, upon motion, leave was granted to plaintiff to file an amended complaint, and order entered. It was stipulated and agreed by counsel for said parties, and so ordered by the court, that plaintiff would submit to defendant a new application for permit to sell milk in Monongalia County, and upon the filing thereof Darold W. Taylor would again make an inspection of the dairy farms tributary to plaintiff's pasteurization and receiving plants, and laboratory facilities and procedures, and such other inspection as may be required by West Virginia Milk Regulations adopted January 3, 1944, or which may be in effect at the time of said inspection, as a prerequisite to the issuance to plaintiff by defendant of a permit to sell milk in Monongalia

County, and that thereupon defendant would rule upon said application, and specify in detail in writing the reasons for his refusal to grant a permit, if refused.

The order also provided that if trial is necessary, the evidence will be restricted to issues raised by the amendments to complaint and the report of the inspector as to conditions subsequent to the present date (November 6, 1953). App. B, p. 11, Court of Appeals.

Amended, as well as original, complaint showed jurisdiction on grounds of diverse citizenship and right of plaintiff under federal constitution to engage in interstate commerce. Amended complaint appears as Appendix C, p. 13 et seq., Court of Appeals.

Plaintiff is a corporation under the laws of Pennsylvania, with its principal place of business in Uniontown, Fayette County, Pennsylvania. Defendant is Health Officer of Monongalia County, West Virginia, with his place of business and residence in the City of Morgantown, Monongalia County, West Virginia. He is a county, not a state officer.

Amended complaint alleges that refusal of defendant to grant a permit to plaintiff to sell milk in Monongalia County is a denial of its right to engage in interstate commerce, and causes a loss to plaintiff of many thousands of dollars per year, exceeding three thousand dollars; that the first report of Darold W. Taylor in January, 1953, was not based upon any adverse findings in the quality of the milk of plaintiff, but upon his inability to find documentary evidence supporting certain requirements; that said evidence is now available; that defendant made or caused arrests of plaintiff's employees engaged in carrying on a lawful business,

and threatened to continue to do so; that a permit was denied plaintiff to protect local milk processors and dealers in Monongalia County from competition, and for the purpose of giving them a monopoly of the milk business in said county; that there is produced within the State of West Virginia only sixty percent of its requirements in milk and milk products; that all the milk processed and distributed by plaintiff in the States of Pennsylvania and Maryland is produced, handled, pasteurized and inspected under and pursuant to the law of Pennsylvania relating to such matters, and designated an Act To Safeguard Human Health and Life By Providing for the Issuance of Permits to and Regulation of Persons and Entities Selling Milk and Milk Products, Conferring Powers and Imposing Duties Upon the Secretary of Health, The Advisory Health Board, and Otherwise Providing for the Administration of the Act and Imposing Penalties; that the methods of processing, handling and distributing said milk go beyond the requirements of the law and regulations of Pennsylvania, and are equivalent to the requirements of West Virginia Regulations, in conformity with Section 11 thereof, as well as with the Model Milk Ordinance and Code recommended by United States Public Health Service, to which West Virginia Regulations conform almost word for word. The prayer of the complaint is for the aid of the court in procuring the permit requisite to carrying on its business in said county. App. C, pp. 14, 18, 25, 26, 27, 28 and 29, Court of Appeals.

Defendant's answer to amended complaint appears as Appendix D, p. 32, Court of Appeals. Defendant states:

> "That the milk proposed to be marketed by the plaintiff is not produced or pasteurized under provisions equivalent to the requirements of the West Virginia

> Regulations, and will not be so produced and pasteurized in the future unless the Pennsylvania milk regulations are changed to conform to the provisions of West Virginia regulations in the following respects" . . . (p. 33)

Defendant then names eight points. But it has developed in the hearing that the first part of point number one, relating to inspection of dairy farms is the crux of the problem. We quote:

> "Inspection of dairy farms and milk plants shall be made by the health officer (a public official rather than an approved inspector employed by the applicant)." (p. 33)

Under Pennsylvania and Pittsburgh practice dairy farms are inspected by approved, qualified inspectors, licensed under laws of Pennsylvania, but who are paid by industry. App. J, p. 89, Court of Appeals. Processing plants are inspected only by employees of Health Department of Pittsburgh, the enforcing agency in this case, and samples of pasteurized milk are picked up by official agents of the department. Samples of raw milk from dairy farms are picked up by technicians of commercial laboratory in Pittsburgh, or personnel of Dairy Products Company of Uniontown. App. J, p. 92, Court of Appeals.

Darold W. Taylor made his second inspection in accordance with the order of the court, and filed a report May 11, 1954. Appendix F, p. 41, et seq., Court of Appeals. It covers thirty-seven producing dairy farms selected at random from the Dairy Products Company's total producer

farms. It gives a United States Public Health Service rating of raw milk sold to plants of 90.82 percent, and pasteurization plant and receiving station, 92.55 percent. Taylor chose the City of Pittsburgh Health Department as the enforcing agency, since it has supervision of Dairy Products Company's processing plant and receiving station, and the producer dairy farms tributary thereto, by reason of the fact that Dairy Products Company sells milk in the City of Pittsburgh, and has a permit from its health department to do so. Under item one, status of enforcement, he reported that,

> "After a review of records in Pittsburgh, Pennsylvania, and as a result of field work on the farms and in processing plant, it is felt that interpretations are being made substantially in conformity with the Public Health Service Milk Ordinance and Code." (p. 44)

In closing, he stated:

> "It is evident from the records available, and the interest shown on the part of the Pittsburgh City Health Department officials, that a satisfactory control program is being set up there. The system and approach to be used by Pittsburgh in carrying out adequate enforcement should satisfy the above requirements adequately." (p. 47)

The survey was made in accordance with sanitary standards required under West Virginia Milk Regulations adopted January 3, 1944. (p. 41)

Defendant rejected the new application by letter, on the stated ground that the supervision of the City of Pittsburgh

Health Department is not compulsory, therefore not in accordance with the most important view of the West Virginia requirements. Appendix G, p. 51, Court of Appeals.

In defendant's deposition he testified that his basis of refusal was that, "The enforcement methods which could be applied to the Dairy Products Company were not in accordance with those required by West Virginia Milk Regulations." Appendix I, p. 60, Court of Appeals; that he was satisfied with all points of criticism in Mr. Taylor's second report excepting number two, having to do with enforcement. Appendix I, p. 75, Court of Appeals. In other words, as found by the District Court, defendant's objections to the second Taylor report had all been eliminated except for the fact that under Pennsylvania and Pittsburgh regulations and practice, inspection of producer dairy farms, and the collection (and testing) of samples (of raw milk) were entrusted to inspectors in the employ of milk producers, Appendix K, p. 116, Court of Appeals; that the quality of the milk of Dairy Products Company was good was admitted by defendant,

> "Well, I would like to be quite clear that I have no question about the quality of the milk from the Dairy Products."
>
> Question by counsel: "It is good quality?"
>
> Answer: "Good quality." Appendix I, p. 80, Court of Appeals.

The case next came on for hearing before Judge Wilkin on September 23, 1954. On that date it was submitted on the pleadings, stipulations, deposition of Roger A. Kennedy, then Health Officer of Monongalia County, and the testi-

mony of Albert H. Brunwasser, Chief of the Milk and Food Division of the City of Pittsburgh Health Department taken before the trial judge September 23, 1954, and briefs.

The court gave its written opinion December 13, 1954, in which it stated:

> "All objections in the second Taylor report had been eliminated except number two. Kennedy was satisfied that the Pittsburgh regulations and enforcement methods generally were up to the standard of the United States Public Health Service and the West Virginia regulations except for the fact that under Pennsylvania and Pittsburgh regulations inspections of producer farms and the collection and testing[1] of samples were entrusted to inspectors in the employ of milk producers." Appendix K, p. 116, Court of Appeals.

The District Court on January 3, 1955 overruled defendant's motion to dismiss the amended complaint, and entered judgment on the merits for plaintiff, prefaced by the following statement:

> "Considered in the light of the aims and basis of West Virginia regulations, this court is constrained to find the enforcement regulations and methods of the Pittsburgh Health Department are equivalent to the regulations and methods of West Virginia, and further finds that the refusal of the Health Officer of Monon-

[1] The use of the words "and testing" here by the District Court is erroneous. Samples of raw milk are taken to Pittsburgh for analysis. Appendix J, p. 92, Court of Appeals.

galia County, West Virginia, to grant a permit to the plaintiff is an unwarranted obstruction to interstate commerce in milk and milk products, and is a violation of the plaintiff's constitutional rights." Appendix K, p. 122, Court of Appeals.

The court ordered that the defendant, Clark J. Sleeth, successor of Kennedy, within five days from the entry of the order of record issue a permit to the plaintiff, Dairy Products Company of Uniontown, to sell its milk and milk products in Monongalia County. Appendix L, p. 125, Court of Appeals.

Motion by defendant for reconsideration was filed January 5, 1955. An order was entered on January 11, 1955 suspending the judgment of the court pending a rehearing. Rehearing was held on April 18, 1955, at Wheeling, West Virginia. At this hearing Albert H. Brunwasser, Chief of the Milk and Food Division of City of Pittsburgh Health Department testified in the presence of the court, and produced the official records of inspection of dairy farms tributary to processing plant of plaintiff, which defendant had stated in his motion were not available at the offices of City of Pittsburgh Health Department. From the records so submitted and testimony of the witness, it appeared that fifty-two of said dairy farms, out of a variable number of two hundred fifty to three hundred, had been inspected by employees of City of Pittsburgh Health Department, as shown by reports of November 4, 1953 and February, 1954. Appendix O, p. 201, Court of Appeals. Witness also testified that he had additional reports that covered the period of June 1, 1953, not included in the total of fifty-two reports, Appendix O, p. 209, Court of Appeals; that the remainder of the producer dairy farms tributary to plaintiff's processing plant were inspected by dairy farm inspectors who had been qualified under the laws of Pennsylvania, and by training and practical experience in the field, and who were licensed by the state to do the work of inspection, and who were employees of and paid by industry, in this instance, Dairy Products Company, Appendix J, p. 89, Court of Appeals; that the City of Pittsburgh Milk Control Division checks and evaluates the dairy farm sanitation reports submitted by the milk industry under the supervision of the City of Pittsburgh, Appendix O, p. 235, Court of Appeals; that out of a possible two hundred fifty dairy farms he had official inspections of fifty-two farms, as shown by reports submitted over a period of thirteen months from November, 1953 to December, 1954, Appendix O, p. 238, Court of Appeals; that he would be able to give a percentage rating on all of the producer farms that are selling raw milk to Dairy Products Company, such as given by USPHS inspection, within a period of at least five days to the Health Officer of Monongalia County, Appendix O, p. 244, Court of Appeals.

At the conclusion of the hearing on the motion for reconsideration, the court entered an order overruling defendant's motion and setting aside the order of the court entered on January 11, 1955 suspending the operation of the court's judgment of January 3, 1955, and directing defendant, within ten days from the entry of the order, to issue a permit to plaintiff to sell its milk and milk products in Monongalia County. Appendix P, p. 263, Court of Appeals.

West Virginia Milk Regulations, adopted January 3, 1944, in accordance with Chapter 16, Article 7, Section 5 of Code of West Virginia, are almost identical with the

Milk Ordinance and Code recommended by the United States Public Health Service, 1939, and the revised edition of 1953. The revised edition of West Virginia regulations of September 16, 1954 follows very closely the earlier edition.

Pennsylvania has not adopted the Milk Ordinance and Code recommended by the United States Public Health Service. The production, processing and sale of milk products is regulated under an Act of the General Assembly designated No. 210, and by Advisory Health Board regulations pertaining to milk and milk products, adopted April 24, 1940, both of which appear in Appendix III herewith. The City of Pittsburgh, under authority of general legislation, is permitted to adopt more stringent requirements relating to milk and milk products than provided for in Act No. 210, and has, through its general health ordinances, granted to the health officer the authority to promulgate regulations, known as No. 500, under which the City of Pittsburgh Health Department operates under more stringent regulations than the basic legislation. Appendix J, p. 94, Court of Appeals.

Under Pennsylvania procedure the City of Pittsburgh Health Department requires that bacteriological analyses be submitted through an approved laboratory semi-monthly of the milk from dairy farms. In addition, milk companies under permit by the City of Pittsburgh are required to submit finished products to City of Pittsburgh Milk Laboratory for analyses; and in addition, City of Pittsburgh Health Department collects official samples by its own staff. Appendix J, pp. 88, 89, Court of Appeals.

On appeal by defendant, the Court of Appeals reversed.

The reasons assigned for the reversal appear on page seven of the opinion, Appendix II herewith. The Court of Appeals placed much emphasis upon the discretionary rights of the Health Officer of Monongalia County to grant or refuse a permit to plaintiff. It gave but cursory consideration to the right of plaintiff under the federal constitution to engage in interstate commerce.

The Court of Appeals disregarded the findings of fact by the District Court, and then stated that the evidence showed that only ten per cent of the Pennsylvania dairy farms and plants were inspected four times each year instead of all the farms and plants every six months, when in fact the testimony of witness Brunwasser shows that during the period September, 1953 to June, 1954 official employees of his department had inspected approximately sixty dairy farms out of a variable number of two hundred fifty to three hundred, which is considerably more than ten per cent. Appendix J, p. 88, Court of Appeals. Inspection of the remainder of the farms was required each six months period, or twice a year, by licensed, approved dairy farm inspectors. The reports of both official and licensed dairy farm inspectors are filed in the office of the City of Pittsburgh Milk Control Division, where they are checked and evaluated. Appendix J, pp. 89, 91, Court of Appeals.

The Court of Appeals then determined that it was well within the discretion of the Health Officer of Monongalia County to determine whether or not the Pittsburgh regulations were equivalent to those of West Virginia, and to decide whether the permit should be issued or refused.

Since the claim of defendant in his answer is that the milk of plaintiff would never be produced or pasteurized

under regulations equivalent to the requirements of the West Virginia regulations unless the Pennsylvania regulations are changed to conform to the provisions of the West Virginia regulations, it becomes apparent that Pennsylvania and Pittsburgh regulations must be identical to those of West Virginia, although Section 11 of the West Virginia Milk Regulations says equivalent, and the revised regulations, substantially equivalent.

It is therefore apparent that the Court of Appeals, in addition to disregarding the fact finding of the District Court, has incorrectly evaluated the evidence, and has misconceived the law applicable thereto.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed for the following reasons:

1. It erroneously interprets the West Virginia Milk Regulations adopted January 3, 1944, as amended September 16, 1954, especially Section 11, Milk and Milk Products From Points Beyond the Limits of Routine Inspection.

The decision, as we interpret it, is that milk from points beyond routine inspection may not be sold in West Virginia unless produced under provisions identical to West Virginia regulations. That is also the method of enforcement of the Health Officer of Monongalia County. In his answer to the amended complaint he says that the milk of plaintiff is not produced under provisions equivalent to the requirements of West Virginia regulations, and will not be so produced in the future unless Pennsylvania regulations are changed to conform to provisions of West Vir-

ginia regulations, so that inspection of dairy farms shall be made by the health officer, a public official, rather than an approved inspector employed by industry. Appendix D, p. 33, Court of Appeals. But Section 11 of [redacted]mended regulations says, not "identical", but "substantially equivalent".

The West Virginia Milk Regulations are patterned after and are practically identical to the Milk Ordinance and Code recommended by the United Public Health Service of 1939. The 1953 edition of the Milk Ordinance and Code contains some revisions, especially of Section 11. This revised section appears in Appendix III to this petition. West Virginia Regulations are statewide in application, but are enforced on a county-unit basis by a county officer. The revised regulations of September 16, 1954, Section 15, provide for enforcement in accordance with the interpretations in Milk Ordinance and Code, 1953 Recommendations of the Public Health Service.

The Health Officer of Monongalia County, who is a county, not a state, officer, finds it practicable to have inspection of dairy farms under his supervision in Monongalia County made by employees of his department, sometimes referred to as "official agents". He has under his jurisdiction seventy-five farms and two processing plants; one inspector does the work. He tries to project this method of dairy farm inspection across the state line into Pennsylvania. The enforcing agency in Pennsylvania, City of Pittsburgh Health Department in this case, has under its jurisdiction and supervision thirty-six processing plants and ten thousand dairy farms. Pennsylvania has adopted a different method of dairy farm inspection under its basic law and regulations. Dairy farms are inspected in part by em-

ployees, or official agents, of the enforcing agency, in this case City of Pittsburgh Health Department, and in part by dairy farm inspectors, qualified and licensed by Pennsylvania, formerly through its Department of Health, but now its Department of Agriculture, who are employees of industry, in this instance Dairy Products Company. These inspectors are required to answer written examination, subjective in nature, and are taken into the field and required to perform in accordance with the requirements of the basic law and regulations; their work is evaluated by the enforcing agency. Appendix J, pp. 91, 98, Court of Appeals.

The City of Pittsburgh Health Department operates under the basic law of the state, and Ordinance No. 500 adopted by the City of Pittsburgh, giving the health department authority to adopt regulations for the production and sale of milk. Regulations have been adopted in pursuance thereof which are more stringent than the basic legislation of Pennsylvania. The health department operates under these regulations. They meet the minimum requirements of the Milk Ordinance and Code USPHS, and in some instances are more stringent. Appendix J, p. 94, and Appendix O, pp. 186 to 192, Court of Appeals.

Darold W. Taylor, in his second survey, Appendix F, p. 44, Court of Appeals, "Status of Enforcement", states that,

> "After a review of records in Pittsburgh, Pennsylvania, and as a result of field work on farms and in processing plants, it is felt that the interpretations are being made substantially in conformance with the Public Health Service Milk Ordinance and Code."

Mr. Taylor is Senior Sanitarian, USPHS Region III,

Washington, D.C. The District Court after hearing all of the evidence, found that the enforcement regulations employed by the City of Pittsburgh Health Department are equivalent to the regulations and methods of West Virginia.

The Health Officer of Monongalia County would not accept the method of dairy farm inspection adopted by Pennsylvania and City of Pittsburgh Health Department. He required that such inspection be identical to that used by him in Monongalia County. The Court of Appeals has adopted his view. It follows that petitioner can never qualify for a permit to sell milk in Monongalia County until Pennsylvania has changed its law, regulations and practice to conform to that followed in Monongalia County. Therefore, the petitioner, having no control over Pennsylvania laws, regulations and practices, may be permanently deprived of its right to engage in interstate commerce under the federal constitution, though its product is considered by the defendant to be of good quality.

City of Pittsburgh Health Department was treated as the enforcing agency by Darold W. Taylor in his survey, because Dairy Products Company has a permit to sell milk in Pittsburgh, and sells large quantities there. Its regulations and procedures are more stringent and its laboratory facilities more adequate than those of Pennsylvania.

The problems of dairy farm inspection as between Monongalia County and Pennsylvania and the City of Pittsburgh are not comparable because of the great difference in the number of units under the respective authorities. Viewed from a state-wide standpoint, the problem in Pennsylvania is greatly magnified, and the financial burden greatly increased.

There is no inhibition in West Virginia Milk Regulations against inspection of dairy farms by qualified and licensed inspectors who are paid by industry. The West Virginia method of inspection has been adopted by the Health Officer outside of the regulations. Whatever he may do in applying his interpretation to dairy farm inspection in West Virginia, we question his right to apply it to Pennsylvania producers in a way to exclude absolutely their product from interstate commerce. That would be the kind of discrimination the court said could not be done in *Dean* vs. *Madison*, 340 U. S. 349.

It is alleged in the complaint that it is the purpose of the Health Officer of Monongalia County so to enforce the milk regulations as to exclude Pennsylvania dairy products from Monongalia County to protect local milk producers and processors from competition. However, this question was not gone into by the trial court because of the procedure followed there to work out a solution of the problem through inspection by a representative of USPHS and avoid extensive taking of testimony.

We refer to the following parts of West Virginia Milk Regulations, 1944, having bearing on the questions raised herein:

Section 1, Sub-section R—Health Officer.

Section 3—Permits.

Section 5—Inspection of Dairy Farms and Milk Plants.

Section 6—The Examination of Milk and Milk Products.

Section 11—Milk and Milk Products from Points Beyond the Limits of Routine Inspection.

Section 15—Enforcement Interpretation.

Pertinent parts of West Virginia Milk Regulations of January 3, 1944, with reference to certain amendments of September 16, 1954, appear in Appendix III herewith.

No question of the constitutionality of the West Virginia Milk Regulations is raised in this case; rather the issue is whether the Health Officer of Monongalia County is not enforcing the regulations in an illegal and unconstitutional manner. In the case of *Minor* v. *The City of Keokuk*, 92 Fed. Sup. 833, the court stated that it could not give approval to the exercise of police power which would operate absolutely to exclude milk distributors' products from interstate commerce. In the case of *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, the court said,

> "A valid law may be wrongly administered by officers of a city, and so as to make such administration an illegal burden or exaction upon the individual."

In *Cummings* vs. *Merchants National Bank of Toledo*, 101 U. S. 903, it is stated that the doings of the parties acting under a statute "may be unlawful, while the statute is valid".

There is no question of the quality of the milk produced and offered for sale by Dairy Products Company. The former Health Officer, Roger A. Kennedy, testified that the milk of Dairy Products Company was of good quality. Appendix I, p. 80, Court of Appeals.

This court, in the case of *Dean Milk Company* vs. *Madison, Supra,* pointed the way to a solution of the problem of inspecting milk supplies in an area remote from the place of consumption:

> "The receiving city may determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milk shed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot-checks the local ratings."

That was done in this case. The court further said in that case:

> "To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation'." *Baldwin* v. *G.A.F. Seelig, Inc., supra,* 294 U.S. at page 527, 55 S. Ct. at page 502.

Section 11 of the Milk Ordinance and Code, USPHS 1953, offers other solutions of the problem. This section appears in Appendix III herewith. Under this revised section it is recommended that the health officer approve without inspection, subject to laboratory tests upon arrival,

milk products from any area or shipper not under his routine inspection (1) when they are produced and processed under regulations substantially equivalent to those of this ordinance, (2) when they are under routine official supervision, (3) when they have been awarded by the milk sanitation authority of the state of origin a rating equal to that of the local supply, or if lower than local supply, equal to ninety per cent or more. The rating given by Darold W. Taylor in his second report is more than ninety per cent.

2. The decision in this case should be reviewed because it is in conflict with the principles laid down by this court in *Dean Milk Company* v. *City of Madison* (1951), 340 U. S. 349; *Baldwin* v. *Seelig, Inc.,* (1935), 294 U. S. 511; *H. P. Hood and Sons, Inc.* v. *Dumond, etc.,* (1949) 336 U. S. 525.

3. The Court of Appeals appears to have disregarded the findings of fact by the District Court, which, unless clearly wrong, and the court did not so find, is contrary to Rule 52(a). Appendix III herewith.

In *U. S.* v. *Yellow Cab Co.,* (1949) 338 U. S. 338, the court held that,

> "While, of course, it would be our duty to correct clear error found in findings of fact, the government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way, but where the trial court has decided it to weigh more heavily for the defendant, such choice between two permissible views of the weight of evidence is not clearly erroneous."

In *Graver Tank & Mfg. Co.*, v. *Linde Air Products Co.*, (1950), 339 U. S. 605, this court held that,

> "A finding of equivalence is determination of fact. Proof can be made in any form through testimony of experts or others versed in the technology . . . Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court, and the court's decision under general principle of appellate review should not be disturbed unless clearly erroneous. . . ."

In this case the District Court found that the enforcement regulations and methods of the Pittsburgh Health Department were equivalent to regulations and methods of West Virginia. This under the above case would be a finding of fact on that question. Appendix K, p. 122, Court of Appeals. This was based on undisputed evidence and the report of Darold W. Taylor The defendant offered no evidence, except on his motion for reconsideration. The evidence presented there availed nothing as against official records produced by plaintiff.

On this question we cite these additional cases:

Cleo Syrup Corp., v. *Coca Cola Co.*, (1943) 139 Fed. 2d, 416.

Nee v. *Linwood Securities Co.*, (1949) 174 Fed. 2d. 434.

The questions presented by this case are of great and recurring significance, touching as they do the right of

plaintiff to engage in interstate commerce under the federal constitution. From the great number of cases we have found on this subject, many of them relate to the dairy business and traffic in milk from one state to another. Such traffic is advantageous to producer and consumer. Some areas have an excess in production of milk beyond local needs, and others a deficit. In this case, West Virginia has a deficit. We recognize the right of the receiving community to protect its citizens by reasonable laws and regulations to insure that the imported milk is of good quality, clean and wholesome. We observe, however, that many municipal and state regulations go far afield from that aim, both in form and method of enforcement, actuated, no doubt, by local interests and prejudices. The fundamental principle of freedom of commerce between states, protected by the federal constitution, which has contributed so much to the growth and strength of our country, should not be lost sight of or ignored.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GLENN HUNTER
CHARLES MCCAMIC
Attorneys for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7039.

Clark K. Sleeth, as Health Officer of Monongalia County, West Virginia,
Appellant,

versus

Dairy Products Company of Uniontown,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING.

(Argued November 15, 1955. Decided December 27, 1955.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and R. DORSEY WATKINS, District Judge.

George R. Farmer (Cletus B. Hanley, Assistant Attorney General of West Virginia, and Albert M. Morgan, Prosecuting Attorney, Monongalia County, West Virginia, on brief) for Appellant, and Glenn Hunter (Charles McCamic on brief) for Appellee.

SOPER, Circuit Judge:

This suit was brought in the District Court by Dairy Products Company of Uniontown, a Pennsylvania corporation, against Roger A. Kennedy, Health Officer of Monongalia County, West Virginia,* to secure a judgment commanding the Health Officer to approve an application of the company for a permit to distribute milk in the county and forthwith to issue the permit. There was also a prayer for an injunction to restrain the Health Officer from prosecuting the company, criminally or otherwise, for selling milk in the county without a permit and from arresting its agents because of any such sale; but the suit was not pressed on the latter ground. Jurisdiction is based on the ground that the action was of a civil nature between citizens of different states wherein the controversy exceeds the sum of $3,000, and the purpose of the suit is to restrain the defendants from interfering with the company in carrying on its lawful business in Monongalia County in the course of interstate commerce.

The principal question at issue is whether the Dairy Products Company had conformed to milk regulations is-

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* Clark K. Sleeth, having succeeded to the office before the conclusion of the case, was substituted as party defendant.

sued by the Public Health Council of the State of West Virginia on January 5, 1944, under the power conferred by Ch. 16, Art. 7, §5 of the Code of West Virginia. It was alleged in the complaint that the Dairy Products Company had complied with the laws and regulations of the State of Pennsylvania regarding the distribution of milk and also with the milk regulations of the City of Pittsburgh which are more stringent than those of the State, and that these laws and regulations were equivalent to the regulations of the State of West Virginia; and that the Company had applied to the Health Officer of Monongalia County for a permit to sell milk in the county, but that he had arbitrarily and unreasonably refused to issue it. The suit was defended on the ground that the Pennsylvania and Pittsburgh regulations were not equivalent to the regulations of West Virginia and therefore the Dairy Products Company was not entitled to the permit. The District Judge found that there was equivalency and therefore held that the refusal of the Health Officer of the county to grant a permit to the county was an unwarranted obstruction to interstate commerce in milk and milk products, and violated the plaintiff's constitutional rights.

The validity of Ch. 16, Art. 7, §5 of the West Virginia Code, which directs the Public Health Council to adopt regulations to provide clean and safe milk and milk products to be enforced by local health authorities throughout the state, is not questioned. Nor is the validity of the regulations themselves challenged. In *Dean Milk Co. v. Madison*, 340 U.S. 349, the Supreme Court of the United States recognized the appropriateness of the local regulation of the sale of milk as within the powers of the states, even though interstate commerce may be affected, in the absence of fed-

eral legislation; and in *State* v. *Bunner*, 126 W. Va. 280, the Supreme Court of West Virginia held that the West Virginia statute did not involve an unconstitutional delegation of legislative authority and that the regulation forbidding the sale of milk without a permit from the county Health Officer was valid, although no statute expressly authorized the Counsel to make the permit a prerequisite of sale. The court also held that the regulation providing that only persons complying with the regulations should be entitled to a permit did not confer on the Health Officer arbitrary power or discretion to grant or refuse a permit; and the court added that if it should be that any regulation was unreasonable or invalid, the applicant should not be required to comply therewith; but the method of procedure in such case was to apply to a proper court to compel the issuance of the permit, rather than to operate in defiance of the regulations.

The regulations issued under the authority of the statute are sweeping in scope and elaborate in detail. Amongst other things, it is provided in §5 that at least once during each grading period, in no case to exceed six months, the Health Officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the State of West Virginia. Section 6 provides for the taking and examination by the Health Officer of at least four samples of the product from each dairy farm and milk plant during each grading period. Section 7 provides for the announcement every six months by the Health Officer of the grades of milk and milk products to be delivered by producers and distributors; and the standards for the grading of the milk, the conditions under which it is produced and handled, and the pasteurization of the product are meticulously prescribed. Section 11 of the regu-

lations with which we are particularly concerned, provides milk and milk products from points beyond the limits of routine inspection of the state may not be sold therein, unless produced and pasteurized under provisions equivalent to the requirements of the West Virginia regulations, provided that the Health Officer shall satisfy himself that the Health Officer having jurisdiction over the production and processing is properly enforcing such provisions. Penalties are provided by §16 for violations of the regulations.

It is manifest that the duty imposed upon the county Health Officer of West Virginia by the statutory regulations involves the construction and application thereof, and the exercise of judgment and discretion in their enforcement. His duties are not so plainly marked as to amount to a positive command, and hence the well established rule applies that the courts will not issue a mandamus or other order to control the action of an executive or administrative officer in the discharge of statutory duties involving the exercise of judgment or discretion, unless the attempted performance of the duty amounts to an abuse of discretion.

Mandamus will lie where there is a clear legal right to the performance of a particular act or duty at the hands of the respondent, and such act or duty is of a ministerial nature[1] rather than one involving the exercise of discretion.[2] It will lie to compel officers with discretionary duties

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[1] *Kendall* v. *United States ex rel Stokes*, 12 Pet. 522.

[2] *Decatur* v. *Paulding*, 14 Pet. 497, 516; *Keim* v. *United States*, 177 U. S. 290, 292; *State* v. *Pocahontas County Court*, 92 W. Va. 222; *Swearingen* v. *Bond*, 96 W. Va. 193; *Peoples ex rel Sheppard* v. *Illinois State Board of Dental Examiners*, 110 Ill. 180.

to take action,[3] but it will not interfere with the exercise of their discretion unless their action is illegal,[4] or is an arbitrary or capricious abuse of such discretion.[5] This remedy is available only when all administrative remedies have been, exhausted,[6] and when there is no other available remedy.[7]

The evidence in this case in our opinion does not disclose such an abuse of discretion as to warrant the intervention of the court. The proceedings in the District Court extended over a considerable period of time, during which careful investigations were made in order to ascertain whether the company's milk complied with the West Virginia requirements. The West Virginia regulations conform with the model milk ordinance and code recommended by the United States Public Health Service; and so the parties to the case agreed to designate Darold W. Taylor of the United States Public Health Service to inspect the farms supplying milk to the company and to examine its receiving and pasteurization plants and laboratory facilities and procedures, and to report his findings to the court to be received in evidence for all proper purposes. This inspection was made and the report was filed in January, 1953. When the case came to trial on November 6 of that year and the Taylor report was submitted, it was found that the West

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[3] *Edgerton* v. *Kingsland*, D. C. 168 F.2d 121; *Paramount Pictures* v. *Rodney*, 3 Cir., 186 F.2d 111.

[4] *Proctor & Gamble Co.* v. *Coe*, D.C., 96 F.2d 518; *State ex rel Kelly* v. *City of Grafton*, 87 W. Va. 191.

[5] *Bates & Guild Co.* v. *Payne*, 194 U.S. 106, 108-9; *State* v. *Clendenin*, 92 W. Va. 618; *Illinois State Board of Dental Examiners* v. *People ex rel Cooper*, 123 Ill. 227.

[6] *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 123.

[7] *Marbury* v. *Madison*, 1 Cr. 137, 169.

Virginia requirements had not been met. Thereupon the plaintiff was permitted to file an amended complaint and Mr. Taylor was designated to make another inspection. His second report was filed May 11, 1954 but the permit was again withheld because the Health Officer of the county was still of the opinion that the enforcement methods of the State of Pennsylvania and of the Pittsburgh Health Department were not equivalent to those of the State of West Virginia.

The case came to hearing under these circumstances. It was shown that some of the objections previously urged by the Health Officer had been met, but that in certain respects the Pittsburgh regulations were not as strictly enforced as those of the State of West Virginia. Two circumstances only need to be referred to in this connection. Section 5 of the regulations, as we have seen, requires that the West Virginia Health Officer shall inspect all dairy farms and all milk plants whose products are intended for consumption within the state at least once during each six months. It will be perceived that this requirement involves an inspection of *all* of the farms and plants and that the inspection be made by the Health Officer of the state. These two requirements were not met by the Pennsylvania or Pittsburgh methods of enforcement. The evidence showed that only about 10% of the Pennsylvania farms and plants were inspected four times each year instead of all of the farms and plants every six months, and also that the inspection was made by employees of the producer or shipper of milk who were authorized to make the inspection by the state officials but were on the payroll of the employer or shipper. It is clear that both of these circumstances relate to important features of the inspection of the product and the enforcement of the regulations, and that it was well

within the discretion of the Health Officer of the county to consider these matters in determining whether or not the Pittsburgh regulations were equivalent to those of West Virginia, and in deciding whether the permit should be issued or refused. In our opinion the refusal of the Health Officer to issue the permit under those circumstances did not involve an abuse of discretion.

Having reached this conclusion we need not pass upon the additional contention of the appellant that the District Court was wholly without jurisdiction to grant the relief prayed in his case. The argument is based upon the long established tenet that a mandamus proceeding is not included within the description of suits of a civil nature at common law of which the federal courts were given jurisdiction by the original Judiciary Act and are now described as civil actions in 28 U.S.C. §§ 1331, 1332, and hence a mandamus may not issue in a federal District Court unless it be necessary for the exercise of its independently conferred jurisdiction.*

Whether it may be said that the rule prohibiting the issuance of mandamus by a federal District Court does not apply, when the jurisdiction of the court is based on diverse citizenship and the issuance of such an order becomes necessary to give effect to the judgment of the court based upon the law of the state, is a question of academic interest only,

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* The origin and basis of the rule was described by Judge John C. Rose, a former member of this court, in his work on Federal Jurisdiction and Procedure, 4 Ed. §192, in these words:

"There was doubtless a practical reason of public policy for reaching that conclusion—a reason which probably explains why the courts have always adhered to the determination they first reached and why Congress has never authorized the federal courts, except in some specially enumerated cases, to entertain petitions for mandamus otherwise than in aid of their other jurisdiction.

for we are satisfied that the power should not be exercised in this case even if it be possessed. Nor have we any reason to decide whether the remedy by injunction would be available under different circumstances.

The judgment of the District Court will therefore be

Reversed.

"Under our dual system of government, there are many opportunities for collision between state and federal authorities. It is not to the public interest that private litigants should be in a position to force them. If a citizen of one state conceived that he had the right to the exercise of some purely ministerial function by a public official of another, he might go into the federal courts and apply for a writ of mandamus to compel that state official to do his duty. In the long run it is probably better that he be forced to seek relief of this kind from a state tribunal. Doubtless state prejudice or partiality sometimes stands in the way of his getting what he should have. If it does, it is a lesser evil than to arouse the antagonisms always so easily stirred up when a federal court undertakes to order a state officer to do something."

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7039.

Clark K. Sleeth, as Health Officer of Monongalia County, West Virginia,
Appellant,

vs.

Dairy Products Company of Uniontown,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING.

This Court having at its November Term, 1955, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on January 25, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered.

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

R. DORSEY WATKINS
United States District Judge.

FILED
FEB. 7, 1956

R. M. F. Williams, Jr.
Clerk

APPENDIX III

CONSTITUTIONAL PROVISIONS, RULES, STATUTES ORDINANCES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Art. 1, Sec. 8, Clause 3—Commerce.

TITLE 28 U.S.C.—Jurisdiction

1254.—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . . . . .

FEDERAL RULE 52(a).—Findings of the Court.

. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

WEST VIRGINIA CODE

Chap. 16, Art. 7, Sec. 5, p. 691.

Regulations by Public Health Council as to Milk and Milk Products.—The public health council[2] shall adopt

[2] The state board of health has succeeded to the rights, powers and duties formerly imposed upon and exercised by the public health council.

regulations to provide clean and safe milk and fresh milk products, and, when promulgated, these regulations shall be the minimum requirements to be enforced by local health authorities throughout the State. A copy of such regulations shall be furnished the commissioner of agriculture for his guidance in performing any duties with relation to milk and milk products imposed on him by law.

Pertinent Parts of West Virginia Milk Regulations, adopted January 3, 1944, in accordance with Chapter 16, Article 7, Section 5, of the Code of West Virginia.

SECTION 3.—*Permits.*—It shall be unlawful for any person to bring into or receive into the State of West Virginia, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product defined in this regulation, who does not possess a permit from the health officer.

Upon written application the health officer shall issue a permit to any person who complies with the requirements of this regulation.

Such a permit may be suspended by the health officer, or revoked after an opportunity for a hearing by the health officer, upon the violation by the holder of any of the terms of this regulation.

Upon written application the health officer shall reinstate or issue a new permit to any person whose permit has been suspended or revoked and has complied with all the requirements of this regulation.

SECTION 5.—*Inspection of dairy farms and milk plants for the purpose of grading or regrading.*—At least once during each grading period the health officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the State of West Virginia, or its police jurisdiction. In case the health officer discovers the violation of any item of sanitation, he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied, but not before the lapse of 3 days; and the second inspection shall be used in determining the grade of milk and/or milk products. Any violation of the same item of this regulation on two consecutive inspections shall call for immediate degrading.

One copy of the inspection report shall be posted by the health officer in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be defaced or removed by any person except the health officer. Another copy of the inspection report shall be filed with the records of the health department.

SECTION 6.—*The examination of milk and milk products.*—During each grading period at least four samples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. . . . Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association. Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the

Association of Official Agricultural Chemists. Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. . . .

Whenever the average bacterial count, the average reduction time, or the average cooling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take one additional sample, but not before the lapse of 3 days, for determining a new average in accordance with section 1(S). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension of the permit, unless the last individual result is within the grade limit.

SECTION 11.—*Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the State of West Virginia may not be sold in the State of West Virginia or its police jurisdiction, unless produced and/or pasteurized under provisions[3] equivalent to the requirements of this regulation; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

West Virginia Milk Regulations were amended September 16, 1954; as amended

[3] which are substantially equivalent to the requirements of this regulation, and which are enforced with equal effectiveness, as determined by a milk-sanitation rating: Provided, That the health officer may satisfy himself that conditions shown by the milk sanitation survey continually remain substantially the same

SECTION 15.—*Enforcement interpretation.*[4]—This ordinance shall be enforced by the health officer in accordance with the interpretations thereof contained in the 1939 edition of the United States Public Health Service Milk Code.

No. 210

AN ACT

To safeguard human health and life by providing for the issuance of permits to, and regulation of persons and entities selling milk and milk products; conferring powers, and imposing duties on the Secretary of Health, the Advisory Health Board; and otherwise providing for the administration of the act; and imposing penalties.

Section 1. Be it enacted, &c., That for the purpose and within the meaning of this act, the following definitions shall obtain:

Regulating entities and persons selling milk and milk products.

Definitions.

"Milk" means milk, skimmed milk, cream, sour milk, sour cream, buttermilk, and all other fluid derivatives of milk, except condensed milk and evaporated milk for manufacturing purposes.

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[4] This regulation shall be enforced by the health officer in accordance with the interpretations thereof contained in Milk Ordinance and Code—1953 Recommendations of the Public Health Service.

"Milk products" means ice cream, ice cream mix, custard ice cream, french ice cream, frozen custard, and other similar frozen products, and all dairy products used in the manufacture thereof.

"Certified Milk" means the product of dairy farms operated in accordance with the "Methods and Standards for the Production and Distribution of 'Certified Milk,' last adopted by the American Association of Medical Milk Commissions Incorporated," and the production and handling of which shall be certified to by a commission instituted in compliance therewith.

"Secretary" means the Secretary of Health of this Commonwealth, or his authorized representative.

"Person" includes singular and plural, masculine and feminine, and any individual, firm, copartnership, institution, association, or corporation thereof.

"To Sell" "for sale" or "sold" and similar terms means the selling, exchanging, delivering, or having in possession, care, control, or custody with intent to sell, exchange, or deliver, or to offer or to expose for sale.

"Dairy farm" is a place or premise where one or more cows are kept, and a part or all the milk from which is sold or delivered to any person.

"Milk plant" is any place or premise or establishment where milk is collected, separated, processed, stored, bottled, pasteurized, or prepared in any manner for sale as milk or milk products.

"Approved inspector" is one, who has proven to the satis-

faction of the secretary, to be a person of good character, trained by school and experience to carry on dairy farm and milk plant inspection in a capable and efficient manner, and has received a certificate of approval from the secretary. Applications for certificates of approval for approved inspectors shall be made on forms which may be secured from the Secretary of Health, and shall be accompanied by a fee of ten ($10) dollars. Certificates of approval shall expire on December thirty-first of each year. Applications for renewal shall be made on forms satisfactory to the Secretary of Health, and shall be accompanied by a registration fee of three ($3) dollars, and shall be returned to the Secretary of Health not later than December fifteenth of each year. Certificates of approval shall not constitute an approved inspector an official employe, agent or authorized representative of the Department of Health, nor shall he represent himself so to be.

Certificates of approval may be refused, suspended or revoked for cause, upon such notice and subject to such conditions, as the secretary shall deem necessary.

"Municipality" includes any city, borough, town, or township in this Commonwealth.

Permit.

Section 2. Except as hereinafter provided, no person shall sell milk or milk products within this Commonwealth without first having obtained a permit from the "secretary," nor otherwise than in accordance with the requirements of this act. Each person desiring a permit to sell milk or milk products shall annually make an application therefor on a form to be secured from

the "secretary." Such application shall set forth—

Contents of the application.

(a) The name and address of the applicant.

(b) The designations of the milk or milk products to be offered for sale.

(c) The name of the municipality or municipalities in which the applicant desires to sell milk or milk products.

(d) An accurate record of each milk plant owned or operated by the applicant for a permit.

(e) Such other information as may be required by the "secretary."

Permits shall be issued only to persons, whose entire milk supply, the farms, where it is produced and the milk plants in which the milk or milk products is handled, have been approved by the secretary, and in any case in which, in his discretion, he shall deem such action necessary for approval, inspected by the secretary. Every permit shall expire annually.

This section shall not apply to a person selling or delivering milk directly from a dairy farm to a milk plant.

Unless the "secretary" shall require a permit, this section shall not apply to a person selling milk or milk products from a store, when such milk or milk products are purchased from a person already in lawful possession of a permit to sell milk or milk products.

This section shall not apply to hotels, restaurants, soda fountains, boarding houses, or other places where milk or milk products is served, when such milk or milk products is to be consumed on the premises thereof, and is purchased from one already in lawful possession of a permit to sell milk or milk products.

The "secretary" may, in his discretion, exempt a person selling milk from not more than one cow from such requirements of this act, as he may deem in each instance to be unnecessary for the protection of the public health.

Section 3. Permits may be refused, suspended or revoked by the "secretary" if, in his judgment, the requirements of this act, and the rules and regulations made in conformity herewith are not complied with by the person making an application for a permit, or to whom a permit has already been issued.

Before refusal to grant a permit or before a permit is suspended or revoked, the secretary shall afford the applicant or holder of the permit an opportunity to be heard, and shall give at least five (5) days written notice of the hearing to the applicant or the holder of the permit, by registered letter sent to the address given in the application. Any person aggrieved by a decision of the secretary, either refusing to re-issue a permit or revoking a permit heretofore issued, may file, within five (5) days thereafter in the court of common pleas of Dauphin County, a bill in equity against the secretary as defendant, alleging therein, in brief detail, the action and decision complained of, and praying for relief, and jurisdiction is hereby conferred upon said court for hearing and disposing of such cases.

Section 4. When an application for renewal of a permit has been regularly made and no notification of a hearing as above described has been sent the applicant by the secretary, the permit of the preceding year shall continue in full force until renewed or revoked in accordance with section 2 and section 3.

Section 5. The secretary may constitute as his agent, for the purpose of issuing permits for the sale of milk or milk products, a department of health, board of health, or health officer of any municipality, and shall accept permits issued by municipalities, under the terms of municipal ordinances equally as stringent as the requirements of this act and enforced by such municipalities, as the only permit required for the sale of milk or milk products in such municipalities.

Section 6. Every person, having made an application for a permit to sell milk or milk products or holding a permit for the sale of milk or milk products, shall, at any time, allow the "secretary" to inspect the herds, stables, and dairy farms from which milk is obtained, handled, or prepared for sale, to inspect the milk plants, pasteurizing, bottling, and handling of milk or milk products, examine books and papers wherein a record is kept of the name and address of each person from whom "milk" or "milk products" is purchased, the amount of "milk" or "milk products" purchased, and the date on which the "milk" or "milk products" was purchased, in any manner whatsoever, and to take such samples of milk or milk products, as may be deemed necessary, upon payment therefor at the usual market price when payment is demanded. The "secretary" shall have the power to subpoena, for the purpose of any hearing, all books and records of any permit holder or of any other corporation or person in any case in which records in its or his possession,

or over which it or he has control, is reasonably necessary to the proper conduct of the affairs of the secretary under this act.

Non-compliance with the provisions of this section by a permit holder is hereby specifically declared to be a violation of this act and subject to the penal provisions hereof, and shall be sufficient grounds for the revocation of the permit of such permit holder.

Section 7. No person shall sell milk that does not bear prominently the designation "Certified Milk" or "Raw Milk" or "Milk for Pasteurization" or "Pasteurized Milk." Other designations may be used with the designation of "Raw Milk" or "Pasteurized Milk," provided the definition of such designation is filed with and approved by the "secretary."

No person shall sell milk products that do not bear prominently the name and address or code number of the processor or maunfacturer, the kind of milk products offered for sale, and the name and location of the milk plant in which the milk products are processed or manufactured.

Section 8. "Raw Milk" shall be produced and handled in the following manner:

(a) "Raw Milk" shall be milk from a cow or cows, determined by physical examination and tuberculin tests conducted in accordance with the rules, regulations, and practices of the State Department of Agriculture pertaining to the individual accredited herd plan or the modified accredited area plan, to be free from communicable disease.

(b) The cows shall be fed, watered, housed, and cared for in such a manner that the milk will be clean and free from disease-producing organisms.

(c) The milking process shall be carried on in a cleanly manner. The milk shall be promptly cooled. The milk containers, utensils, and equipment shall be of such material and so constructed that they may be readily cleaned. The milk and the cleansed containers, utensils, and equipment shall be protected from flies.

(d) A milk house or milk rooms which are properly constructed, lighted, ventilated, drained, and kept clean shall be provided and used exclusively for the handling of "Certified Milk" or "Raw Milk." An adequate supply of steam or hot water shall be provided and used for cleansing milk containers and dairy utensils.

(e) Every applicant for or holder of a permit to sell raw milk, desiring to purchase milk for resale as raw milk, shall receive permission from the "secretary" before accepting milk from any source other than that given in the application for a permit. All sources of raw milk shall be inspected and approved by the "secretary."

Section 9. Every applicant for or holder of a permit to sell pasteurized milk or milk for pasteurization or milk products shall keep an accurate record of the names and addresses of the owners or operators of all dairy farms from which milk is received. This record shall be kept on file in the milk plant where the milk is received, and shall be available at all times for the inspection of the secretary.

An accurate report of a sanitary inspection on all dairy farms from which milk is received and of the milk as de-

livered to the milk plant shall be kept on file in the milk plant. The sanitary inspection shall be made semi-annually by an approved inspector at the expense of the applicant for or holder of a permit. Such payment shall be made only by the applicant for or holder of the permit for the plant to which the milk from the farm which is inspected is or is to be delivered. Such inspections may be made by the secretary. Within thirty days after demand by the secretary, additional inspections shall be made of any or all farms, and reports thereon filed in the milk plant. Inspection reports shall be made upon forms satisfactory to the secretary.

No applicant for or holder of a permit to sell pasteurized milk or milk for pasteurization or milk products shall receive milk from a dairy farm until the report of the sanitary inspection made by an approved inspector shall have been placed on file in the milk plant where the milk is received for the inspection and approval of the secretary, nor shall he receive milk or milk products from any milk plant owned or operated by another person who is not in lawful possession of a permit.

No milk or milk products shall be received in any milk plant for any purpose, unless such milk or milk products shall have been produced on dairy farms, or acquired from milk plants approved by the secretary, or unless permission for the receipt of such milk or milk products shall be obtained from the secretary.

Only milk or milk products may be prepared or processed in a milk plant.

Section 10. "Milk for Pasteurization" shall be milk produced and handled in the following manner:

(a) "Milk for Pasteurization" shall be milk from a cow or cows, determined by physical examination and tuberculin tests conducted in accordance with the rules, regulations and practices of the State Department of Agriculture, pertaining to the individual accredited herd plan or the modified accredited area plan, to be free from communicable disease.

(b) The cows shall be fed, watered, housed, and cared for in such manner that the milk will be clean.

(c) The milking process shall be carried on in a cleanly manner. The milk shall be promptly cooled. The milk containers, utensils and equipment shall be of such material and so constructed that they may be readily cleansed.

(d) A milk house or milk rooms properly constructed, lighted, ventilated, drained, and clean shall be provided on the dairy farm producing milk for sale as "Milk for Pasteurization," and shall be used exclusively for the handling of such milk.

Section 11. Milk containers in which "Milk for Pasteurization" is received in milk plants from dairy farms shall be thoroughly cleansed and dried before returning to the dairy farm.

(a) Milk plants in which "Milk for Pasteurization" is received from dairy farms shall be properly constructed, lighted, ventilated, drained, and clean.

(b) The milk plants in which "Milk for Pasteurization" is received shall not be constructed nor altered until the plans and specifications thereof have received the approval of the "secretary." Equipment before being installed shall likewise be approved by the secretary.

(c) "Certified Milk" or "Raw Milk" may be sold as "Milk for Pasteurization."

Section 12. "Pasteurized Milk" shall be milk produced and handled in the following manner:

(a) "Pasteurized Milk" is milk heated to such a temperature and for such a length of time that all harmful organisms are destroyed.

(b) "Milk for Pasteurization" shall be used in the preparation of "Pasteurized Milk."

The holder of a permit to sell "Pasteurized Milk" may purchase "Milk for Pasteurization" from a person in lawful possession of a permit to sell "Pasteurized Milk."

(c) Milk containers in which milk is received in milk plants in which milk is pasteurized shall be thoroughly cleansed and dried before returning to a dairy farm or a milk plant.

(d) Apparatus for the pasteurization of milk shall be equipped with an accurate indicating thermometer and a recording thermometer of a type approved by the secretary. A true record of pasteurization as given by the recording thermometer shall be on file at the place where the milk is pasteurized.

(e) Milk to be sold as "Raw Milk" may be received, cooled, and bottled in a building where milk is pasteurized, providing all milk received in the building where milk is pasteurized meets the requirements for "Raw Milk" as set forth in this act.

(f) The rooms of buildings, in which milk is exposed during and after pasteurization, shall be properly lighted, ventilated, drained, and clean, and shall be used for no other purpose than to provide a place for cleansed milk containers and utensils, and for the handling of milk during and after pasteurization.

(g) Milk during and after pasteurization, and cleansed milk containers, utensils, and equipment shall be protected from flies.

(h) Pasteurizing plants shall be provided with and use an adequate supply of steam or hot water for cleansing milk containers, utensils, and equipment.

(i) Equipment with which milk comes in contact shall be constructed in such manner as to be easily cleansed. Demountable apparatus, with which milk comes in contact, shall be taken apart and cleansed each day such apparatus is in use. Surfaces with which milk comes in contact shall be of smooth non-corrosive material and free from open seams.

(j) "Pasteurized Milk" shall be placed in the final container in the milk plant where the milk is pasteurized immediately after pasteurization.

(k) The milk plants in which milk is received or pasteurized shall not be constructed nor altered until the plans and specifications thereof have received the approval of the "secretary." Equipment before being installed shall likewise be approved by the secretary.

Section 13. Adequate facilities shall be provided and used for furnishing clean containers, free from injurious organisms, in which to sell "Raw Milk" or "Pasteurized Milk"

or "Milk for Pasteurization" or "Milk Products." Bottles or containers, whether of glass or other material, shall be filled and closed without any part of the hand coming in contact with the inner surface of the bottles or containers, or in contact with bottle caps. Caps shall be obtained in sanitary containers and kept therein until used.

Section 14. Milk plants, in which milk or milk products is handled, received, bottled, or pasteurized, shall be provided with sanitary, adequate and conveniently located toilet facilities.

Section 15. The water supply used in milk plants shall be sufficiently abundant for all purposes, easy of access, and free from contamination.

Section 16. The Secretary of Health shall have the power to make requirements concerning the number and character of bacteria in milk and milk products after hearing.

Bacteriological analysis of milk and milk products shall be made under the supervision of a laboratory, the equipment and director of which have been approved by the Secretary of Health. The bacteriological analysis of milk and milk products shall be in accordance with Standard Methods of Milk Analysis of the American Public Health Association and the Association of Official Agricultural Chemists last adopted, unless special permission is given by the secretary for a modification of the above standard methods.

Section 17. "Milk products" shall be prepared from milk produced and handled in the following manner:

(a) "Milk for Pasteurization" shall be used in the preparation of "milk products."

(b) The "Milk for Pasteurization" used in the preparation of "milk products" shall be pasteurized or otherwise treated as indicated by the "secretary" before or during the preparation of "milk products."

(c) Milk containers in which "Milk for Pasteurization" is received in milk plants for the preparation of "milk products" shall be thoroughly cleansed and dried before returning to a dairy farm or a milk plant.

(d) The rooms of buildings in which "milk products" are exposed during and after preparation shall be properly lighted, ventilated, drained, and clean, and shall be used for no other purpose than to provide a place for cleansed containers and utensils and for the handling of "milk products."

(e) "Milk products" during and after preparation, and cleansed containers, utensils, and equipment shall be protected from flies.

(f) Milk plants in which "milk products" are prepared shall be provided with an adequate supply of steam or hot water for cleansing containers, utensils, and equipment.

(g) Equipment with which "milk products" come in contact shall be constructed in such a manner as to be easily cleansed. Demountable apparatus with which "milk products" come in contact shall be taken apart and cleansed each day such apparatus is in use. Surfaces with which "milk products" come in contact shall be of smooth non-corrosive material and free from open seams.

(h) The milk plants in which "milk products" are prepared shall not be constructed nor altered until the plans and specifications thereof have received the approval of the

"secretary." Equipment before being installed shall likewise be approved by the secretary.

Section 18. The provisions of this act, and the regulations made thereunder, shall not be taken nor deemed to repeal existing municipal ordinances, nor to prevent municipalities from enacting and enforcing new ordinances for the further protection of the public health: Provided, That this act shall be considered as establishing uniform requirements and regulations, and that nothing herein contained shall be deemed to prevent municipalities from ordaining and enforcing such additional requirements in excess of the requirements and regulations hereunder, as may be deemed necessary, from time to time for the preservation of public health, and to require applications from, and to issue permits to, such persons as may be defined by local ordinances.

Section 19. The advisory health board of the State Department of Health is hereby authorized to adopt and promulgate rules and regulations for the proper enforcement of this act.

Section 20. Any person violating any provisions of this act or rules and regulations pertaining thereto shall, upon conviction thereof, before any magistrate, alderman, or justice of the peace in the county where the offense shall have been committed, be subject to a fine of not less than ten dollars ($10) and not more than fifty dollars ($50) for each offense, to be collected by summary conviction as like fines are now collected by law, or in case of nonpayment of the fine to undergo imprisonment in the county jail for a period not exceeding thirty days: Provided, That any person convicted more than twice of violating the same provisions of this act or rules and regulations pertaining there-

to shall be subject to a fine of not less than fifty dollars ($50) nor more than two hundred and fifty dollars ($250), or in case of nonpayment of the fine to undergo imprisonment in the county jail for a period not less than thirty days nor more than six months.

Prosecutions for violations of any of the provisions of this act and the regulations thereto shall be brought by the Secretary of Health or his agent or by any health officer of any municipality in this Commonwealth.

All fines collected under this act shall be paid to the secretary and by him into the State Treasury, through the Department of Revenue.

Section 21. Whenever, in the opinion of the secretary, a given supply of milk or milk products is considered unsafe or a menace to public health, the secretary may seize, condemn, denature, or destroy such milk or milk products without compensation to the owner or owners thereof.

The general sanitary conditions of any place, wherein milk or milk products are produced, stored, prepared, or handled and its immediate surroundings, shall be such as to insure a safe and clean supply of milk or milk products.

The secretary shall have the right to exclude from sale any part of a milk supply which may be considered unsafe, or milk or milk products which is produced on dairy farms or handled in milk plants which fail to meet the requirements of this act.

A satisfactory flush closet or sanitary privy shall be provided at all dairy farms where milk is produced or handled.

Section 22. The Attorney General may, at the instance of the Secretary, in the name of the Commonwealth institute proceedings in equity in the court of common pleas of Dauphin County for the purpose of enjoining any person from offering milk or milk products for sale without a permit as provided in this act, and for such purpose jurisdiction is hereby conferred upon said court. In such case the Attorney General shall not be required to give bond.

Section 23. Constitutional Construction.—It is hereby declared to be the legislative intent that if this act cannot take effect in its entirety because of the decision of any court holding unconstitutional any part thereof, the remaining provisions of the act shall be given full force and effect as completely as if the part held unconstitutional had not been included herein.

Section 24. The act of May second, one thousand nine hundred and twenty-nine (Pamphlet Laws, one thousand two hundred twenty-nine), entitled "An act to safeguard human health and life by providing for the licensing and regulation of persons and entities dealing in milk for human consumption; conferring powers and imposing duties on the Secretary of Health, and the Advisory Health Board, and otherwise providing for the administration of the act; and imposing penalties," as amended by the acts, approved the eighteenth day of May, one thousand nine hundred and thirty-three (Pamphlet Laws, eight hundred four), the twenty-second day of May, one thousand nine hundred and thirty-three (Pamphlet Laws, eight hundred thirty-two), and the seventeenth day of January, one thousand nine hundred and thirty-four (Pamphlet Laws, two hundred thirty-one—one thousand nine hundred thirty-three—one thousand nine hundred thirty-four), are hereby repealed.

All other acts or parts of acts inconsistent herewith are hereby repealed.

Section 25. The permits heretofore granted by the Secretary of Health under the terms of the act of one thousand nine hundred twenty-nine (Pamphlet Laws, one thousand two hundred twenty-nine), and the amendments thereto, shall remain in full force and effect as permits under this act until such time as they, respectively, by their terms expire, or until the secretary shall revoke or suspend the same in accordance with his powers hereunder.

When effective.

Section 26. This act shall become effective immediately upon approval by the Governor.

APPROVED—The 2d day of July, A. D. 1935.

GEORGE H. EARLE

The foregoing is a true and correct copy of Act of the General Assembly No. 210.

[Signed]

Secretary of the Commonwealth

THE ADVISORY HEALTH BOARD OF THE PENNSYLVANIA DEPARTMENT OF HEALTH AT A MEETING HELD IN THE CITY OF HARRISBURG, OFFICE OF THE SECRETARY OF HEALTH, APRIL 24, 1940, ADOPTED THE FOLLOWING RULES AND REGULATIONS FOR THE ENFORCEMENT OF ACT 210, APPROVED JULY 2, 1935, P. L. 589, AN ACT "TO SAFEGUARD HUMAN HEALTH AND LIFE BY PROVIDING FOR THE ISSUANCE

OF PERMITS TO, AND REGULATION OF PERSONS AND ENTITIES SELLING MILK AND MILK PRODUCTS; ENFORCING POWERS, AND IMPOSING DUTIES ON THE SECRETARY OF HEALTH, THE ADVISORY HEALTH BOARD; AND OTHERWISE PROVIDING FOR THE ADMINISTRATION OF THE ACT; AND IMPOSING PENALTIES."

I. PERMITS. *Section 2*—The permit year shall begin September 1st and end August 31st the following year.

II. DESIGNATIONS. *Section 7*—The term "Prominently" means most important in appearance and conspicuous in position.

In addition to the designation "Certified Milk," "Raw Milk," "Milk for Pasteurization," or "Pasteurized Milk," there shall appear on the milk container sufficient name and address to identify the person to whom the permit has been issued for the sale of the milk.

The term "Other Designations" shall include such designations as "A," "Homogenized," or "Vitamin D."

Designations including the day of the week or the day of the month shall, when used with the designation "Raw Milk," mean the day produced and, when used with the designation "Pasteurized Milk," mean the day pasteurized. Trade marks that do not interfere with or detract from the designation of the milk or milk products may be used.

III. RAW MILK. *Section 8, Paragraphs (b), (c) and (d)*—

1. The water supply, if from a spring or well, shall be protected from all surface and underground contamination. The well shall be protected with a cover of concrete or equally impervious material.

2. Toilets shall not be located so as to endanger the water supply. Privies shall have fly tight vaults. Excreta shall be removed before it reaches the ground level. Cesspools and septic tanks shall not overflow to the surface of the ground.

3. It is recommended that flanks, udders and tails of the cows be clipped at the time of stabling in the fall to make it easier to keep the cows clean.

4. Sufficient light shall be provided so that the necessary work can be carried on in the stable during daylight. Two square feet of unobstructed light for each animal or stanchion in the stable is considered satisfactory.

5. Sufficient ventilation shall be provided for the health of the animals and to eliminate odors in the stable. Five hundred cubic feet of air space per cow is considered satisfactory.

6. Stable floors, drops, and feeding alleys shall be constructed of concrete or equally satisfactory material and kept in good repair. The walk back of the cows, excluding the gutter, shall be at least three feet in width.

7. Manure shall be removed from the stable daily and disposed of so that the milking animals do not have access to same.

8. Stable walls shall be reasonably smooth. The ceil-

ing shall be tight to prevent dust from sifting through. Walls and ceilings should be whitewashed annually or painted biennially.

9. Barn yard shall be properly graded and drained in order to eliminate the accumulation of water. Waste from pig pens, barns, and milk houses should not drain into the yard.

10. Hogs, pigeons, poultry, and other objectionable animals shall be excluded from the cow stable.

11. Milk utensils and containers used in the production of milk shall be constructed of non-corrodible, smooth metal, free of open seams, rust, rough solder, or wooden handles. Seamless or electrically welded utensils and containers are recommended. Cans shall be returned to the farm in a clean and dry condition. Single-service straining material shall be used.

12. Utensils, containers, and equipment, after being washed and sterilized, shall be stored in the milk room or other protected room. Suitable metal racks, at least ten inches above the floor, shall be provided for the storage of utensils.

13. Milking machines shall be constructed in such a manner that they can be readily taken apart for cleansing, and after cleansing and sterilizing they shall be stored in such a manner as to prevent contamination.

14. Wet hand milking is prohibited as it is considered a dangerous and insanitary practice.

15. A strip cup shall be used in order to determine any

abnormalities in the milk. The milk in the strip cup shall not be sold. Abnormal milk shall not be sold.

16. Every precaution shall be taken to protect the milk from flies in the cow stable, as flies are recognized as a carrier of disease.

17. Milk stools shall be constructed so that they can stand on the floor without falling over; if of wooden construction, they should be painted. Milk stools shall be clean and stored in a clean place.

18. Proper milk cooling equipment shall be provided.

19. Milk shall be cooled except when milk is delivered to the consumer in his own container in the milk house.

20. A one-room milk house or a single milk room shall be sufficient if the milk is sold to the consumer in containers brought to the dairy farm by the consumer; otherwise a milk house containing two or more rooms shall be provided.

(a) Sufficient light shall be provided in the milk house to carry on the necessary operations.

(b) Ventilation shall be provided to eliminate odors in the milk house. It is recommended that cross-ventilation be provided by windows located as close to the ceiling as possible, and constructed so that the top sash is movable and a flat screen may be placed on the outside.

(c) Flies shall be kept out of the milk house.

(d) The milk house shall be lined and ceiled inside and of smooth finish.

(e) It is recommended that the inside of the milk house be painted with a light-colored paint, preferably of gloss variety.

(f) The floor of the milk house shall be of concrete or equally impervious material and shall be constructed in such a manner that it will drain properly. Water from the floor shall not drain into the cooling tank. In future construction, impervious material shall be used to a height of at least ten inches above the floor.

(g) The milk house shall not open directly into a stable nor a room used for domestic purposes, nor shall it be located in the barn yard.

(h) The milk house shall be used only for the handling of milk and milk utensils and should be located as conveniently to the stable as possible, giving consideration to objectionable features such as hog pens, toilets, etc. It shall be large enough to allow sufficient unobstructed working space.

(i) When the milk house is located at a distance from the milking stable, and is not used regularly for straining milk, a suitable straining room shall be provided at a more convenient location. The straining room shall conform to the same specifications as the milk house with the exception of the cooling vat.

21. "Raw Milk" shall be delivered to the consumer only in containers that have been filled in milk house or milk room.

22. A mechanical means of filling and capping bottles shall be used.

23. The usually accepted practices regarding sanitation shall be considered in scoring methods.

IV. MILK FOR PASTEURIZATION. *Section 10, paragraph (b), (c) and (d)—*

1. The water supply, if from a spring or well, shall be protected from all surface and underground contamination. The well shall be protected with a cover of concrete or equally impervious material.

2. Toilets shall not be located so as to endanger the water supply. Privies shall have fly-tight vaults. Excreta shall be removed before it reaches the ground level. Cesspools or septic tanks shall not overflow to the surface of the ground.

3. It is recommended that flanks, udders and tails of cows be clipped at the time of stabling in the fall to make it easier to keep the cows clean.

4. Sufficient light shall be provided so that the necessary work can be carried on in the stable during daylight. Two square feet of unobstructed light for each animal or stanchion in the stable is considered satisfactory.

5. Sufficient ventilation shall be provided for the health of the animals and to eliminate odors in the stable. Five hundred cubic feet of air space per cow is considered satisfactory.

6. Stable floors, drops, and feeding alleys shall be constructed of concrete or equally satisfactory material and kept in good repair. The walk back of the cows, exclud-

ing the gutter, shall be at least three feet in width.

7. Manure shall be removed from the stable daily and disposed of so that the milking animals do not have access to same.

8. Stable walls shall be reasonably smooth. Ceiling shall be tight to prevent dust from sifting through. Walls and ceilings should be whitewashed annually or painted biennially.

9. Barn yard shall be properly graded and drained in order to eliminate the accumulation of water. Waste from the pig pens, barns, and milk houses should not drain into the yard.

10. Hogs, pigeons, poultry, and other objectionable animals shall be excluded from the cow stable.

11. Milk utensils and containers, used in the production of milk, shall be constructed of non-corrodible, smooth metal, free of open seams, rust, rough solder, or wooden handles. Seamless or electrically welded utensils and containers are recommended. Cans shall be returned to the farm in a clean and dry condition. Single-service straining material shall be used.

12. Utensils and containers after being washed shall be stored inverted on a metal rack in the milk house. The metal rack shall be at least ten inches from the floor in order to prevent splashing into the utensils when washing the floor.

13. Milking machines shall be constructed in such a manner that they can be readily taken apart for cleansing

and after cleansing, they shall be stored in such a manner as to prevent contamination.

14. Wet hand milking is prohibited, as it is considered a dangerous and insanitary practice.

15. A strip cup shall be used in order to determine any abnormalities in the milk. The milk in the strip cup shall not be sold. Abnormal milk shall not be sold.

16. Every precaution shall be taken to protect the milk from flies in the cow stable, as flies are recognized as a carrier of disease.

17. Milk stools shall be constructed so that they can stand on the floor without falling over; if of wooden construction, they should be painted. Milk stools shall be clean and stored in a clean place.

18. Cooling tanks shall be constructed of cement or equally impervious material, and shall be deep enough for the water to reach the neck of the can so that no milk is above the surface of the water. An insulated tank with an insulated cover is recommended. A drain should be provided in the tank for proper cleansing.

19. The water in the tank shall be changed frequently to keep it clean.

20. The milk shall be cooled promptly to 60 degrees Fahrenheit, and maintained at that temperature until delivered to the milk plant. In case milk is not cooled, it should be delivered to the milk plant within two hours from the time of milking.

21. (a) Sufficient light shall be provided in the milk

house to carry on the necessary operations.

(b) Ventilation shall be provided to eliminate odors in the milk house. It is recommended that cross-ventilation be provided by windows located as close to the ceiling as possible, and constructed so that the top sash is movable and a flat screen may be placed on the outside.

(c) Flies shall be kept out of the milk house.

(d) The milk house shall be lined and ceiled inside and of smooth finish.

(e) It is recommended that the inside of the milk house be painted with a light-colored paint, preferably of gloss variety.

(f) The floor of the milk house shall be of concrete or equally impervious material and shall be constructed in such a manner that it will drain properly. Water from the floor shall not drain into the cooling tank. In future construction, impervious material shall be used to a height of at least ten inches above the floor.

(g) The milk house shall not open directly into a stable nor a room used for domestic purposes, nor shall it be located in the barn yard.

(h) The milk house shall be used only for the handling of milk and milk utensils and should be located as conveniently to the stable as possible, giving consideration to objectionable features such as hog pens, toilets, etc. It shall be large enough to allow sufficient unobstructed working space.

(i) When the milk house is located at a distance

from the milking stable, and is not used regularly for straining milk, a suitable straining room shall be provided at a more convenient location. The straining room shall conform to the same specifications as the milk house with the exception of the cooling vat.

22. The usually accepted practices regarding sanitation shall be considered in scoring methods.

V. PASTEURIZED MILK. *Section 12, paragraph (a)* —"Pasteurized Milk" shall be milk which has been subjected to a temperature of not less than 143 degrees Fahrenheit for a period of not less than 30 minutes, or subjected to a temperature of not less than 160 degrees Fahrenheit for a period of not less than fifteen seconds, or milk which has been treated by a process which has been approved by the Advisory Health Board and for the use of which a written permit has been issued by the Secretary.

VI. CLEANSING CONTAINERS, UTENSILS AND EQUIPMENT. *Section 8, paragraph (d); Section 12, paragraph (h); Section 13, and Section 17, paragraph (f).*— The cleansing of containers, utensils and equipment shall include the use of steam or the use of water at a temperature of not less than 180 degrees Fahrenheit, or water at a temperature of not less than 165 degrees Fahrenheit for a period of not less than three minutes.

The Secretary may require the use of an accurate indicating thermometer and a recording thermometer of a type approved by the Secretary on apparatus used for the cleansing of containers, utensils and equipment for the purpose of obtaining an accurate record of the time and temperature used in cleansing containers, utensils, and equipment.

THE ADVISORY HEALTH BOARD OF THE PENNSYLVANIA DEPARTMENT OF HEALTH AT A MEETING HELD IN THE CITY OF HARRISBURG, OFFICE OF THE SECRETARY OF HEALTH, ON NOVEMBER 27, 1945, ADOPTED THE FOLLOWING RULES AND REGULATIONS AMENDING SECTION I OF THE REGULATION ADOPTED APRIL 24, 1940, AS AUTHORIZED UNDER ARTICLE XXI OF THE ADMINISTRATIVE CODE, COMMONWEALTH OF PENNSYLVANIA, ACT OF APRIL 9, 1929, P. L. 177, AS AMENDED.

Section 1—Milk to be sold as "Raw Milk" shall be milk prepared in accordance with the general requirements of Section 8 of Act 210, approved July 2, 1935, and Advisory Health Board Rules and Regulations made in accordance with the Act. In addition to the requirements of Act 210 and Advisory Health Board Rules and Regulations made in conformity therewith, "Raw Milk" shall be milk from a cow or cows determined to be free from Bang's Disease (Bovine Brucellosis) in accordance with the result of tests conducted in accordance with the rules, regulations, and practices of the State Department of Agriculture pertaining to the Individual Accredited Herd Plan.

Section 2—Applications shall be required and permits issued for the sale of goat's milk in accordance with Act 210, approved July 2, 1935, and Advisory Health Board Rules and Regulations made in accordance therewith, giving due consideration to the difference in the size of the cow and the goat.

RULES AND REGULATIONS OF THE DEPARTMENT OF HEALTH, OF THE COMMONWEALTH OF PENNSYLVANIA, ADOPTED AUGUST 24, 1949, BY THE ADVISORY HEALTH BOARD FOR THE PROTECTION OF THE LIVES AND HEALTH OF THE PEOPLE OF THE COMMONWEALTH BY SPECIFYING THE MANNER OF CAPPING MILK BOTTLES OR CONTAINERS:

On and after September 1, 1950, all Milk sold within this Commonwealth in glass Milk containers must be capped as follows:

> "The cap or cover shall cover the pouring lip to, at least, its largest diameter."

Paper containers shall provide the same protection for the pouring lip.

MILK ORDINANCE AND CODE

1953 Recommendations of The Public Health Service

Section 11 (p. 143): Milk and Milk Products From Points Beyond the Limits of Routine Inspection.

Milk and milk products from points beyond the limits of routine inspection of the municipality of _____ may not be sold in the municipality of _____, or its police jurisdiction, unless produced and/or pasteurized

under provisions which are substantially equivalent to the requirements of this ordinance, and which are enforced with equal effectiveness, as determined by a milk-sanitation rating.

Provisions for Inspection—This section is intended to permit the health officer to bar milk and milk products shipped in from beyond the normal milkshed, unless he can assure himself that they meet the provisions of the Ordinance. Under no conditions should the health officer authorize the receipt of such shipments when arrangements cannot be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled "ungraded milk" when distributed.

Approval of Supplies—Subject to laboratory tests upon arrival, the health officer should approve, without his inspection, supplies of milk or milk products from any area or shipper not under his routine inspection (1) when they are produced and processed under regulations substantially equivalent to those of this Ordinance, (2) when they are under routine official supervision, and (3) when they have been awarded, by the milk-sanitation authority of the State of origin, a milk-sanitation rating equal to that of the local supply or, if lower than that of the local supply, equal to 90 percent or more, on the basis of the Public Health Service rating method. Lists of interstate milk shippers and their ratings, as reported by the State health authorities and spot-checked by the Public Health Service, are issued periodically by the Public Health Service for the information of receiving communities. These lists may be obtained either from the State health authority or from the Public Health Service.

Section 7, Item lr, (p. 52): Cows-Health.

All milk for pasteurization shall be from herds which are located in a modified accredited[5] tuberculosis-free area, as determined by the Bureau of Animal Industry, United States Department of Agriculture, and which have been tested for tuberculosis not more than six years prior to the adoption of this ordinance and at least every six years after such test: . . .

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[5] Darold W. Taylor's second report (App. F, p. 45, Court of Appeals): "The areas surveyed are in a modified accredited area, therefore, would meet the requirements of the Public Health Service Code."

4/29

MAY 2 1 1956
HAROLD B. WILLEY, Clerk

No. 916

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

DAIRY PRODUCTS COMPANY
OF UNIONTOWN,

Petitioner,

vs.

CLARK J. SLEETH, HEALTH OFFICER OF
MONONGALIA COUNTY, WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN G. FOX,
Attorney General,
State of West Virginia,
Charleston, West Virginia.

ALBERT M. MORGAN,
Prosecuting Attorney,
Monongalia County,
Morgantown, West Virginia.

GEORGE R. FARMER,
Morgantown, West Virginia,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 916

DAIRY PRODUCTS COMPANY
OF UNIONTOWN,

Petitioner,

VS.

CLARK J. SLEETH, HEALTH OFFICER OF
MONONGALIA COUNTY, WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent opposes the granting of the petition for certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above case on December 27, 1955.

QUESTIONS PRESENTED BY THE DECISION OF THE LOWER COURTS.

Respondent disagrees with the statement of the Questions Presented as set out in Petitioner's Petition and asserts the following:

The constitutionality of the West Virginia Law and Regulations (Petitioner's Appendix III, pages 39—43) is not raised by pleadings and was conceded in both lower courts (Petitioner's Appendix I, page 31) and by the Petition of Petitioner, page 23.

Petitioner's milk is produced and pasteurized under Pennsylvania and City of Pittsburgh Regulations which recognize and permit inspections and laboratory tests to be made by Petitioner's own employees while the West Virginia law requires the same inspections to be made by a public official—the health officer. (Petition, page 4 and Appendix III, pages 41-42).

West Virginia law and Regulations promulgated thereunder require the Respondent to refuse a permit for sale of milk and milk products produced outside the limits of routine inspection by state officials unless *produced and/or pasteurized* under provisions equivalent to West Virginia Regulations and then only after the health officer shall have satisfied himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions (Petitioner's Appendix III, page 42).

The duty imposed by law upon the Respondent involves the construction and application thereof and the exercise of judgment and discretion in the enforcement of the law.

Thus the sole question for determination on this Petition is whether the Respondent has arbitrarily exercised that judgment and abused that discretion.

This is the issue determined by the Court of Appeals and the District Court. (Petitioner's Appendix I, pages 34—36; Appendix K—Record—Court of Appeals, page 122).

RESPONDENT'S STATEMENT OF THE CASE.

In general the Petitioner's statement of the case is correct. However, some omissions material to consideration of the questions raised are now noted.

For many years prior to 1951 Petitioner held a permit to sell milk in the cities of Uniontown and Pittsburgh, Pennsylvania, and as early as 1947 and again in 1950 it had applied for a similar permit to sell milk in Monongalia County, West Virginia, but these applications were refused after inspections made by the predecessor's of Respondent. (Appendix C—Record—Court of Appeals, pages 17—21).

At no time prior to April, 1954, did the farms and plants from which Petitioner's milk was produced and in which it was stored and pasteurized, achieve a rating of as much as 90% as determined by inspections made by officials of the Health Department of West Virginia and the United States Public Health Service, and the Enforcement of Sanitary Standards by Pennsylvania, Uniontown, Pittsburgh and Petitioner's employed inspectors and officials has never been of such character as to meet the requirements of the United States Public Health Recommended Milk

Code which is identical with West Virginia Regulations (See Record—Appendix A and Appendix F).

Concerning the Enforcement Agency (City of Pittsburgh) the United States Public Health Service Inspector in his report of April 12—14, 1954, (Record —Appendix F, pages 44—47) said that there was no documentary evidence to indicate that dairies and plants had been inspected once each six months; or that disinfection temperatures and chlorine strengths were checked; or that pasteurization plant equipment was tested at required intervals; that Petitioner's laboratory did not meet required standards; that farm producer samples of milk are not collected by the Pittsburgh Health Department; that records are not being fully kept on all phases of the milk program; that because of changes then being made in the status of the milk sanitation program it was not practical to tabulate a numerical rating on Enforcement Methods and that it was probable such rating could be made in six months.

Upon rehearing in the District Court Mr. H. D. Martin, Sanitarian, Monongalia County, Health Department of West Virginia, and George R. Farmer, one of Counsel, in this case testified fully in support of the facts set out in the affidavit filed as the basis for rehearing and their testimony is uncontradicted that the condition of the records in the Pittsburgh Health Department more than seven months following the last Taylor report, had not been improved and were in a chaotic condition. (Record—Appendices N—O, pages 131—138).

While it is alleged in the complaint that the Regulations and Standards of the City of Pittsburgh and the

State of Pennsylvania are equivalent to and more stringent than those of West Virginia and this same fact is asserted in the testimony, the Pittsburgh Regulations were never introduced into evidence. The basic law of Pennsylvania (Sec. 18—Petitioner's Appendix III page 57) specifically provides that municipalities may ordain and enforce additional requirements in excess of those having state wide application. Any municipality in Pennsylvania may adopt the United States Public Health Service Recommended Ordinance and thus fully conform to West Virginia requirements. No state action is necessary.

REASONS FOR REFUSING THE WRIT.

1. The question presented by the decisions of the lower courts and the decisions themselves do not fall within any of the categories set out in Rule 19, Part V of the Rules of this Court. Congress has not enacted any federal laws or regulations pertaining to the sale of milk and the decisions of this Court recognize that local regulations are applicable even though interstate commerce may be affected.

> Dean vs. Madison, 340 U. S. 349, 95 L. Ed. 329.
>
> Milk Control Board vs. Eisenburg etc., 306 U. S. 346, 83 L. Ed. 752.
>
> Baldwin vs. Seelig, 294 U. S. 511, 79 L. Ed. 1032.
>
> Hood vs. DuMond, 336 U. S. 525, 93 L. Ed. 865.

The Congress of the United States has since 1895 from time to time enacted local regulatory laws for sale of fluid milk in the District of Columbia which provide

for inspection of farms and plants by the Health Officer of the District as a prerequisite to maintenance of a license to sell milk in the District, even though the milk originates in the states, and further provides that no officer or employee of the Health Department of the District shall in his private capacity serve for fee or reward any person licensed to maintain a dairy farm or dairy in the District or to bring milk into the District.

1940 Code of District of Columbia, Sections 33—301—321 and especially 33—320 and 33—321.

The West Virginia Milk Regulations are identical with the Model Milk Ordinance Recommended by the United States Public Health Service and which provides standards recognized as appropriate in the interest of public safety, health and welfare by this Court in Dean vs. Madison.

This Court has often upheld the right of states to regulate, in the interest of the safety, health and well being of its citizens, the importation into the state of livestock, food stuffs, etc. as exemplified by the following:

Certificate of freedom from Bangs disease of herd from which imported cattle are derived, to be executed by chief livestock sanitary official of state of origin.

Mintz vs. Baldwin, 289 U. S. 346, 77 L. Ed. 1245.

Requirement for State Inspection of livestock from other states as required by state statute not met by inspection by federal inspector enforcing federal law.

Reid vs. Colorado, 187 U. S. 137, 47 L. Ed. 108.

State law requiring labelling of animal foodstuffs as to content and providing for inspection by state inspectors upheld even though standards provided may require foodstuff to conform to exact standards of the State of Indiana.

Savage vs. Jones, 225 U. S. 501, 56 L. Ed. 1182.

The state has power to protect the health of its people and to impose reasonable restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the state and the safeguards required.

Price vs. Illinois, 238 U. S. 446, 59 L. Ed. 1400.

2. The Health Officer in considering whether the Pennsylvania Statute and Regulations are equivalent to those of West Virginia followed to the very letter the United States Public Health Service Recommended Ordinance and Interpretations (1953 Revision of Public Health Bulletin No. 220, 1939) as set out on pages 44 and 43 respectively,

> "Industry Inspections—Where the Ordinance, as adopted locally, contains the proviso of footnote 21, the health officer may accept results of periodic industry inspection of producer dairies provided such inspection is a *supplement to, and not a substitute for, official inspection.*" (Italics Ours)

Footnote 21 referred to reads:

"Where the State Law permits the following pro-

> viso may be inserted; "Provided, the health officer may accept, as a supplement to official inspection, the results of periodic inspections by industry, of producer dairies which he checks periodically and finds satisfactory."

On page 43 (Ibid) in commenting on the first sentence of Section 5 of the Ordinance which reads,

> "Prior to the issuance of a permit and at least once every six months thereafter, the health officer shall inspect all dairy farms and all milk plants . . ."

the comment and interpretation is,

> "The first sentence of this section should not be taken to imply that one inspection every six months is a desirable frequency. It should be regarded, instead, as the legal minimum."

These interpretations and instructions are conclusive that the very spirit and purpose of the Regulation is to safeguard the public health through public officials who actually perform all duties required and not to entrust enforcement to the permit holder, subject only to noncompulsory and inadequate official "checking."

On page VI Preface to the foregoing Bulletin is the following statement:

> "As of September 1, 1952, the Milk Ordinance recommended by the Public Health Service had been adopted by 1,542 municipalities and 397 counties. In addition it serves as the basis for state law or regulations of 34 States and 2 Territories. It is in effect State-wide in all of these States and both Territories. It is used also, as the standard for milk served on interstate carriers, and has been incorporated into Federal Specifications."

If Courts substitute their judgment for that of trained scientists and administrators upon questions which those scientists and administrators have spent their lives in mastering, and then go further and hold that because the expert has reached a different conclusion that he is arbitrary and has deprived a disgruntled nonconforming litigant of his constitutional rights, the wheels of progress will grind to an abrupt stop. The lower Court did just that in this case.

3. A court cannot by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary disharge of his official duties—such action would be productive of nothing but mischief.

Keim vs. United States, 117 U. S. 290, 44 L. Ed. 774.

Where the duty of an executive or administrative officer is not so plainly prescribed as to be free from doubt and equivalent to a positive command, but depends upon statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Wilbur vs. U. S. Ex Rel. Kadrie, 281 U. S. 206, 74 L. Ed. 809.

Ex Rel. Giard, etc. vs. Helvering, 301 U. S. 540, 81 L. Ed. 1272.

U. S. vs. Black, 128 U. S. 52, 32 L. Ed. 354.

Ex Rel. Hall vs. Payne, 254 U. S. 343, 65 L. Ed. 295.

In the present case the statute and Regulations under which the Respondent acted and with whose provisions he is charged with enforcement do amount to a positive command. But the command is that the Respondent shall not permit sale of milk "from points beyond the limits of the State of West Virginia . . . unless produced and or pasteurized under provisions equivalent to the requirements of this Regulation; provided that the health officer shall satisfy himself that the officer having jurisdiction over the production and processing is properly enforcing such provisions." The lower Court substituted its own judgment upon the mixed questions of law and fact which had been determined by the the Respondent in the course of his official duties, for that of the health officer. The Circuit Court reversed on this ground.

4. The Respondent followed eactly the "reasonable and adequate alternative" suggested in Dean vs. Madison (supra) in that he determined the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings given the Petitioner by the Pennsylvania (Uniontown and Pittsburgh) authorities, through an authorized Senior Scientist of the United States Public Health Service who upon two inspections rendered an adverse report.

5. The Supreme Court of the United States will not grant a writ of certiorari merely to review the evidence or inferences drawn from it.

General Talking Pictures Corporation vs. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273.

National Labor Relations Board vs. Waterman S. S. Corp., 309 U. S. 206, 84 L. Ed. 704.

United States vs. Johnston, 268 U. S. 220, 69 L. Ed. 925.

Since the validity of the statute and Regulations under which Respondent acted are not questioned, the sole question for consideration is, "Did Respondent act arbitrarily in reaching his decision that the Pennsylvania Regulations and the enforcement procedures to implement them are not the equivalent of West Virginia Regulations?" A determination of this question involves consideration of all the evidence in the case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the writ should be denied.

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